J. C. Penney, Inc. *and* International Brotherhood of Teamsters, Local Union No. 41, AFL–CIO. Cases 17–CA–17911, 17–CA–18290, and 17–CA–18332

September 30, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On July 1, 1996, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, J. C. Penney, Inc., Overland Park, Kansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Naomi L. Stuart, Esq., for the General Counsel.
Jack D. Rowe, Esq. (Lathrop & Gage L. C.), of Kansas City, Missouri, and *Cynthia G. Farris, Esq.*, of Dallas, Texas, for the Respondent.
Dennis R. Speak, of Kansas City, Missouri, for the Charging Party.

DECISION

INTRODUCTION

ALBERT A. METZ, Administrative Law Judge. This case was heard at Overland Park, Kansas, on April 24–26, 1996.[1] The International Brotherhood of Teamsters, Local Union No. 41, AFL–CIO (the Union) has charged that J. C. Penney, Inc. (Respondent) has violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] All subsequent dates refer to 1995 unless otherwise indicated.

I. BACKGROUND

The Respondent operates a large Catalog Fulfillment Center (the Center) in Lenexa, Kansas. The Center has an enclosed area of about 40 acres. Over 1000 employees work at this location. In early 1995 the Union started a campaign seeking to represent the employees at the Center. Employee supporters of the Union started distributing union materials in the Center shortly after the commencement of the campaign.

II. SECTION 8(a)(1) ALLEGATIONS RELATING TO UNION MATERIALS

A. *Removal of Union Materials*

Several complaint allegations focus on the Respondent's removal of union materials from bulletin boards, lockers, employees' work carts, and cafeteria tables during the period March 10 to November 3. The Respondent either admits or does not controvert that supervisors did remove the union materials as alleged. However, the Respondent defends its actions based on a policy against unapproved postings.

1. Bulletin boards

Nonunion materials regularly appeared on some of the Center's bulletin boards. Certain of the materials were solicitations for the United Way and March of Dimes charities. Other postings were personal and included thank you notes, party announcements, Christmas cards, a solicitation for maid service, and collections for deaths or hospitalizations. The testimony showed that at least some of these materials remained posted for lengthy periods of time. A company approved publication, the Lenexa Board of Trade, was also posted on bulletin boards. This paper listed personal items for sale among employees.

Jeffrey Sembler, Respondent's personnel manager, testified that Respondent's posting policy would not allow displaying personal items, solicitations, or anything else that did not have direct effect on work. He conceded that permission would not be given for any union materials because these would be considered a solicitation. Supervisors did remove union materials from the bulletin boards. In at least one instance a supervisor removed a union paper and left untouched an adjacent noncompany posting.

An employer has a right to restrict the use of company bulletin boards. However, that right may not be exercised discriminatorily so as to restrict postings of union materials. *Guardian Industries Corp.*, 313 NLRB 1275 (1994), enf. denied in pertinent part 49 F.2d 317 (7th Cir. 1995). While the evidence shows that the Respondent has in some instances enforced its rule against nonapproved postings this can best be characterized as spotty. Moreover, The Respondent admits union postings would never be approved even though other personal postings do regularly appear on the boards. I find that under all the circumstances the Respondent's policy of removing papers from its bulletin boards was disparately applied to union materials. Respondent thereby violated Section 8(a)(1) of the Act. *Honeywell, Inc.*, 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983).[2]

[2] The Respondent argues that it voluntarily posted some of the union materials on easels along with its responses. I find this is not

2. Work carts

On March 10, operations manager, Tom Reichl, removed two union bumper stickers from Paul Farris' work cart. Reichl left undisturbed several nonunion stickers and pictures of Farris' family that were affixed to the cart. It is the practice of employees at the Center to personalize their carts with stickers, photographs, and other memorabilia.

Later the same day, Farris called personnel manager, Jeffrey Sembler, to inquire about the removal of the union stickers from his cart. Sembler told him employees could not put union insignia on the carts as they were company property. Farris asked Sembler if union notices could be posted on bulletin boards or walls. Sembler said union notices could not be posted anywhere in the Center.

Sembler testified that he told Farris he could personalize his cart with family pictures. He added, "You can't have any inappropriate sayings or cartoons that are inappropriate or offensive, pictures, and no solicitation material." Sembler denied telling Farris he could not post union material on company bulletin boards.

The Respondent has established a permissive practice of allowing the decoration of work carts. Reichl's removal of the union stickers and Sembler's affirmation of that action were discriminatory modifications of the practice. The Respondent thereby violated Section 8(a)(1) of the Act.

3. Lockers

On August 23, employee Joice Mumma, witnessed Supervisor Roger Marks and later, an unidentified security guard, remove union postings from her locker. She testified that other materials were regularly taped on the lockers. These materials included sport team stickers, birthday notes, cafeteria menus, and holiday decorations. It is unclear how long such items remained posted.

The Respondent produced several witnesses who confirmed that materials would occasionally be posted on the lockers but that this was against company policy. When the locker postings were known to the Respondent they would be removed. It was in the exercise of this policy that the union locker materials were removed from Mumma's locker.

The record as a whole establishes that the Respondent has regularly enforced its policy of not permitting materials to be affixed to employee lockers. I find that the Government has not proved by a preponderance of the evidence that the Respondent disparately removed Mumma's union postings from her locker.

4. Cafeteria tables

On November 2, union handouts were placed on unoccupied eating tables in the Center's cafeteria. Shortly thereafter two supervisors, Steve Crabaugh and Don Parrish, removed the material. The Respondent presented credible evidence from several witnesses about clearing cafeteria tables. It was common for supervisors, the cleaning service and others to police the eating tables so they were clean of any materials remaining after workers had left the area. Typical items thrown away included newspapers and catalogs. I find, based on the record as a whole, that the Respondent did not violate Section 8(a)(1) of the Act by removing the union materials from unoccupied cafeteria tables.

B. *Promulgation of Posting Rule*

The Government alleges that on March 17 the Respondent unlawfully promulgated a rule that required obtaining permission before posting any materials on the company bulletin boards.

The rule in question was not new. It had been published in the Respondent's employee handbook since at least 1977. The handbook rule reads as follows:

> Bulletin boards are located throughout the Center, generally near time clocks. Company announcements such as policy changes, holiday schedules and Company news of general interest are posted on these boards. Personal postings are not permitted.

The Respondent has a practice of answering employee questions of a general interest by means of a "Chat Line" publication. A question was raised by someone about postings on bulletin boards. In response to that question the Respondent discussed the matter in a March 17 Chat Line:

> Company bulletin boards are a tool for communicating J. C. Penney business and Company sponsored functions and activities. Our policy requires that all posted documentation be approved and authorized by department management or Personnel before distribution. Personal postings are not permitted.

The Respondent's restatement of its handbook rule on March 17 is found not to be the promulgation of a rule in response to the Union's campaign. The rule has existed since at least 1977. I find that the restatement of the rule on March 17 was not a violation of Section 8(a)(1) of the Act.

C. *Interference with the Distribution of Literature*

On approximately November 7, employee Randy Peters was standing at the entrance to the Center's cafeteria handing out union literature. Peters testified he was approached by Supervisor Jim Stika who asked him his name. Peters told Stika his name and Stika walked away. Peters states that he then continued distributing the union materials without interruption.

Stika testified that he had been called by Personnel Manager Jeffrey Sembler about reports of someone handing out materials by the cafeteria. Sembler wanted to make sure the individual was an employee. He asked Stika to check out the matter. Stika went to the area and asked Peters his name and satisfied himself that Peters was an employee. Stika testified that Peters offered him a copy of the handout but he declined and then left the area.

Under all the circumstances, is not unreasonable that the Respondent wanted to assure itself of the identity of a person distributing materials in its large warehouse. The brief conversation between the two men is found not to be an interference with the employee's right to distribute union mate-

a defense to the discriminatory removal of union materials from bulletin boards. The union papers were singled out for removal. Additionally, the reposting was restricted to areas determined by the Respondent. Finally the reposting policy did not begin until the fall of 1995—months after the original removal of union materials from bulletin boards.

rials at the Center. I find that the Respondent did not violate Section 8(a)(1) of the Act by this conduct.

D. *Policy of Putting Union Material on Company Easels*

On April 10, 1996, the Government amended the complaint. An allegation was added that on November 9 Frank Kemp (catalog fulfillment center manager) "disparately prohibited the distribution and posting of Union materials by announcing a policy of displaying Union materials on easels."

On November 9 a "major rep" meeting was held which involved department employee representatives and management personnel. Randy Heldenbrand was one of the employee representatives. He asked Kemp why the Respondent had picked up union materials from the cafeteria. Heldenbrand recalled Kemp said that he did not have to provide an open forum for the Teamsters inside the Center. Heldenbrand then asked about a rumor he had heard that the Respondent was going to provide bulletin boards throughout the plant for employees to post union materials. Kemp did not respond to that inquiry but proceeded to another subject.

The minutes of the meeting were subsequently posted. They report the following discussion:

> Q. Flyers were passed out this week concerning the union. Why did management pick them up? I was told it was against the law to pick them up.
>
> A. We have easels to display union material as well as our response. One of the main reasons that we went to displaying information both ours and theirs on easels was to minimize the miscellaneous papers being posted and left laying around. [G.C. Exh. 10.]

Heldenbrand testified that no mention was made of easels in the meeting. Kemp did not testify but Personnel Manager Sembler did. He recalled the question being asked. He remembered Kemp saying that Respondent picked up all unattended materials on cafeteria tables.

At about the time alleged the Respondent began placing union materials on easels in the Center. Typically the Respondent would post a refutation of the union publicity with its own position on whatever had been reported in the union material.

I have already found that these easel postings are not a defense to the unlawful removal of union materials from bulletin boards. (Fn. 2.) In so finding it is emphasized that the Respondent is free to display union materials on easels and provide its own retort to such papers. However, the announcement of the easel policy in the meeting minutes is a different matter. The Respondent's answer as to why union materials were picked up implies that it was because easels are available. This statement leaves the incorrect impression that easels are the only proper means of circulating union materials at the Center. I find that under all the circumstances the Respondent's announcement of its use of easels is a violation of Section 8(a)(1) of the Act as alleged in the amendment to the complaint.

III. ALLEGATIONS RELATING TO DIANA SANDERS JACCARD

The Government alleges that employee Diana Sanders Jaccard was unlawfully threatened and discriminatorily returned to medical leave status because of her support for the Union. The Respondent denies Jaccard was ever threatened. Further it asserts that Jaccard was placed on medical leave status when her temporary work assignment was finished and other suitable work could not be found for her.

A. *Background of Jaccard's Employment*

Jaccard was a supporter of the Union. She attended union meetings, signed a union authorization card, solicited other employees to sign cards, and wore union buttons. Jaccard volunteered to become an in-plant organizer for the Union. She was identified as one of four such union organizers in a February 2, 1995 letter the Union sent to the Respondent.

In the summer of 1994 Jaccard was on medical leave. She had suffered a job related injury to her right wrist. As a result Jaccard was under medical restriction of no overhead movements on the right side and no writing. The Respondent was attempting to find work she could perform with her restrictions. Because of her medical limitations, Jaccard was unsuccessful in performing one job that was found for her.

Horace Smith, Respondent's employment and personnel relations manager, received a call in midsummer 1994 from Manager Dan Moritz, stating that he required some assistance for "peak season" scanning work. The Respondent has an annual peak season increase in work that commences in approximately August and lasts through December. Smith determined that Jaccard might be able to do the job. Smith asked Personnel Representative Jim Stika to set up the employment for Jaccard. Smith testified that the job was temporary for the peak season.

In August Jaccard was called to fill the scanning job in the Central Warehouse office. She remembered that she was telephoned by Personnel Manager Jeffrey Sembler, about the job. Jaccard testified that she asked if the job was permanent and that Sembler replied that it was. Employee Joice Mumma testified to a conversation she had with Jaccard's supervisor, Mark Smith, at the time Jaccard started the scanning work. Mumma recalled Smith telling her that she and other CPC clerks would not be filling in at the scanning any longer as Jaccard was doing the job "permanently."

The Respondent's witnesses declared that Sembler never telephoned Jaccard about the scanning job. Rather they testified that it was Personnel Representative Jim Stika who made the offer. Stika testified that he called Jaccard at home and told her that a temporary position of scanning for the peak season was available. Stika's testimony was corroborated by an E-mail message he sent on August 15, 1994, which reads in part:

> Dennis, I have another update for you. Diane [sic] Sanders was brought back on August 12th, 1994, as a grade four data entry operator in Central Warehouse office. Diane will be helping out with the keying for peak season.

I find that Stika's testimony that he was the one that called Jaccard is the most credible version of what happened. I also credit his testimony that he told Jaccard that the job was to help out during the peak season. While Jaccard and Mumma may have understood that Jaccard's job was "permanent," I find from the record as a whole that this was not correct.

The evidence, as detailed below, establishes that the scanning job was for a limited duration.

Jaccard continued to perform scanning work until she was returned to medical leave status on March 10. The Respondent asserts that Jaccard's temporary assignment had come to an end and no other work could be found for her because of her medical limitations. The Government contends the return to medical leave resulted, at least in part, because of Jaccard's union activities.

Horace Smith, Respondent's employment and personnel relations manager, was contacted by Manager Moritz sometime in January regarding Jaccard's work ending. The scanning work had been reduced at that point because the peak of the seasonal work was over and because some scanning functions were being transferred to workers in the warehouse. Moritz told Smith he thought that the assignment would end in a couple of weeks. Smith started looking for other jobs Jaccard could perform with her medical restrictions.

Horace Smith acknowledges he learned of Jaccard's union sympathies when he was shown a copy of the Union's February 2 letter naming her as an organizer. Smith saw the letter after his conversation with Moritz.

No work was discovered that Jaccard could carry out and she was returned to medical leave. In late July or early August Jaccard consulted with her doctor and had her writing restriction removed. As Jaccard was able to perform more tasks without this restriction she was rehired by the Respondent shortly thereafter. Her new job is a higher paying position than her scanning job. At the time of the instant hearing Jaccard continued to work for the Respondent at the Center.

B. *Threat of Discharge and Attempt to Discipline*

The Government alleges that on February 13 Supervisor Mark Smith threatened Jaccard with discharge because of her union support. The Respondent denies any such threat was made.

Jaccard testified that on about February 13 she was working when Smith approached her and they discussed her pending marriage. Another employee, Joanne Wells, was also present. Jaccard was wearing a union button on her blouse. Jaccard recalled that Smith noticed the union button and looked surprised. He then said, "Oh, you're for the Union." When Jaccard did not reply, Smith stated, "I'm glad you got a husband." Jaccard recalled that Wells looked sharply at Smith and said, "Oh, you won't live long." Smith then walked away.

Smith denied that he had ever seen Jaccard wearing a union button. He also denied that he had any conversation with her about the Union, or that he threatened her with job loss because of her union support. Employee Joanne Wells did not testify.

Based on the demeanor of the two witnesses I credit Jaccard who gave a detailed description of the encounter and seemed to accurately relate her recollection. Smith gave a general denial of the event and was not persuasive in his demeanor or denial. I find that under all of the circumstances Smith's remarks were a reference to the possibility of Jaccard losing her employment because of her support for the Union. Respondent violated Section 8(a)(1) of the Act by this threat.

Jaccard testified to a second conversation with Smith on February 15.[3] Smith called Jaccard into his office where only the two of them were present. Smith told Jaccard their department manager, Dan Moritz, had instructed him to write her up for poor production. Jaccard was unaware of any production standards that applied to her. She questioned Smith as to what her production standards were. Smith was unable to answer her question. He stated that he needed to check on the matter and he thus would not write her up at that time but would get back with her. The subject was never mentioned to Jaccard again. Smith denied that the conversation of February 15 took place. He testified that Jaccard's work was always very good.

Considering the demeanor of these two witnesses it is found that Jaccard did have the February 15 conversation with Smith as she recited. Smith's unqualified denial of the event is not credited.

C. *Analysis of Jaccard's Medical Leave*

The General Counsel has the initial burden of establishing that union or other protected activity was a substantial or motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support such a showing of discriminatory motivation are union activity, employer knowledge, timing, and employer animus. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); and *Manno Electric*, 321 NLRB No. 43 (May 12, 1996).

The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. sub nom. 705 F.2d 799 (6th Cir. 1982); and *T & J Trucking Co.*, 316 NLRB 771 (1995).

Starting in February, Jaccard was a visible union supporter. She was publicly named to the organizing committee and she wore a union button. The Respondent unquestionably had knowledge of Jaccard's union sympathies.

The element of animus is present as well in this case. This is evidenced by the unlawful removal of union materials, and, more specifically, the actions of Supervisor Mark Smith in threatening Jaccard because of her union sympathies. Smith's actions are significant evidence on behalf of the Government's case supporting the claim of discrimination against Jaccard.

The timing of Jaccard's impending removal from scanning work preceded her union activity. Thus initial discussions

[3] The Government does not allege this February 15 incident as an independent violation of the Act. I do, however, consider the encounter in assessing the motivation for Jaccard being returned to medical leave status on March 10.

that she was no longer going to be needed in the central warehouse office occurred in late January—prior to knowledge of her union activity. Most importantly the record establishes that the scanning work in the central warehouse was being significantly reduced. The peak season had passed. Additionally, the office scanning was diminishing because warehouse personnel started performing part of this work. Both events were long anticipated and conform to the evidence I credit that Jaccard's position was a temporary assignment.

The record as a whole does not show that Jaccard was unreasonably picked out for medical lay off. The uncontroverted evidence shows the Respondent continued to attempt to find a job that Jaccard could perform. It is undisputed that Jaccard was limited in her ability to write and reach overhead. She was thus restricted to jobs that would accommodate her physical limitations. This search was unsuccessful and she was returned to medical leave. When Jaccard was able to get her writing restriction changed she was immediately rehired to a higher paying position.

I conclude that the Respondent has rebutted the Government's prima facie case concerning Jaccard's return to medical leave. I find the Respondent did not violate Section 8(a)(1) and (3) of the Act when Jaccard was placed in medical leave status on March 10.

CONCLUSIONS OF LAW

1. J. C. Penney, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Teamsters, Local Union No. 41, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Maintaining or enforcing a rule or policy which discriminatorily prohibits the posting of union materials on company bulletin boards and work carts that are otherwise available for the general use of employees or which implies union materials will only be posted on company easels.

(b) Threatening an employee with discharge because of her union sympathies.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not violated the Act except as herein specified.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) of the Act, I recommend that it be required to cease and desist therefrom and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed under Section 7 of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, J. C. Penney, Inc., Lenexa, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing any rule or policy which discriminatorily prohibits the posting of union-related materials on company bulletin boards and employee work carts that are otherwise available for the general use of employees or which implies union materials will only be posted on company easels.

(b) Threatening employees with the loss of employment because of their union sympathies.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and rescind any of rules or policies which discriminatorily restrict employees use of bulletin boards or postings on work carts which are otherwise available for general use of employees or which implies union materials will only be posted on company easels.

(b) Within 14 days after service by the Region, post at its facility in Lenexa, Kansas, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 15, 1995.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."